RESOLUTION NO. 2014-10

A RESOLUTION OF THE ALBANY CITY COUNCIL AUTHORIZING THE CITY MANAGER TO EXECUTE THE FIRST AMENDMENT TO THE PURCHASE AND SALE AGREEMENT WITH WESTERN FORGE AND FLANGE COMPANY FOR PURCHASE OF 540 CLEVELAND AVENUE FOR THE PUBLIC WORKS SERVICE CENTER PROJECT

WHEREAS, effective May 6, 2013 the City of Albany (BUYER) and Western Forge and Flange (SELLER) entered into a Purchase and Sale Agreement for the disposition of the property located at 540 Cleveland Avenue (Alameda County Assessors Parcel 066-2760-014-08); and

WHEREAS, said Purchase Agreement provided that the close of escrow for the transfer of the property was conditioned on certain actions concerning the remediation of soils and groundwater contamination of the property and other due diligence activities, with a deadline for close of escrow no later than December 31, 2013, with an administrative extension of the close of escrow deadline allowed by mutual consent to January 31, 2014; and

WHEREAS, the Buyer and Seller have made significant progress on the completion of their respective obligations to satisfy the conditions to the close of escrow, have mutually agreed to extend the closing deadline to January 31, 2014, and further agreed to administratively extend to March 7, 2014, but require additional time to complete the actions that are conditions to close of escrow; and

WHEREAS, as a result of information obtained during the initial time frame of the Agreement, regarding the soils and groundwater contamination of the property from its prior use as an industrial facility, the parties desire to amend the conditions under which the close of escrow will occur, pursuant to the FIRST AMENDMENT TO THE PURCHASE AND SALE AGREEMENT, attached hereto as Exhibit A.
NOW THEREFORE, BE IT RESOLVED, that the City Council of the City of Albany hereby authorizes the City Manager to execute the FIRST AMENDMENT TO THE PURCHASE AND SALE AGREEMENT, attached hereto as Exhibit A.

BE IT FURTHER RESOLVED, this resolution shall become effective immediately upon its adoption.

PEGGY THOMSEN, MAYOR
FIRST AMENDMENT TO PURCHASE AND SALE AGREEMENT

THIS FIRST AMENDMENT TO PURCHASE AND SALE AGREEMENT (the "First Amendment") is made and entered into effective as of March ____, 2014 (the "Effective Date"), by and between the City of Albany, a municipal corporation ("Buyer") and Western Forge & Flange Co., a California corporation ("Seller"). Seller and Buyer are hereinafter referred to individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, Seller is the owner of that certain real property consisting of approximately 30,726 square feet located at 540 Cleveland Avenue, Albany, California, known as Alameda County Assessor's Parcel No. 066-2760-014-08, and more particularly described in Exhibit A, attached hereto and incorporated herein by this reference (the "Property"); and,

WHEREAS, effective on May 6, 2013, the Parties entered into a Purchase and Sale Agreement (the "Sale Agreement"), pursuant to which Seller agreed to sell and Buyer agreed to purchase the Property, subject to the satisfaction of certain conditions prior to Closing, including (among others) that (a) Seller shall have completed remediation of the Property in accordance with a Corrective Action Plan ("CAP") approved by the Alameda County Environmental Health Department (the "County"), (b) the County shall have issued a No Further Action or equivalent letter to Seller for the Property (the "County No Further Action Letter") and (c) Buyer shall have approved, or shall have been deemed to have approved, specified matters relating to the Property prior to the expiration of the Due Diligence Period (as defined in the Sale Agreement) as such may have been extended pursuant to the Sale Agreement; and,

WHEREAS, Section 11.2 of the Sale Agreement provided that Seller was to use its best efforts to obtain approval of the CAP on or before June 30, 2013, however, if such approval was not obtained by June 30, 2013, either party had the right to terminate the Sale Agreement by written notice to the other; and,

WHEREAS, by electronic mail dated August 30, 2013, the Parties agreed to extend the date by which Seller was to obtain approval of the CAP until October 31, 2013 and the Due Diligence Period was extended until November 30, 2013; and,

WHEREAS, Section 8 of the Sale Agreement states that, provided that all of Buyer’s conditions to closing described in Section 11 have been satisfied, the Parties intend to close escrow within thirty (30) days following the latest of (a) the expiration of the Due Diligence Period, (b) the date of completion of demolition and removal of existing structures on the Property, and (c) completion of the CAP and the issuance of the County No Further Action Letter; and,
WHEREAS, the Sale Agreement further provides, that in no event shall the Close of Escrow be later than December 31, 2013, without the written approval of Buyer and Seller, and that the approval of an extension until January 31, 2014, shall not be unreasonably withheld, if the County No Further Action Letter has not been issued by December 31, 2013; and,

WHEREAS, on October 14, 2013, the County approved the CAP and authorized Seller to commence and complete the remediation of the Property in accordance with the CAP; and,

WHEREAS, by electronic mail dated December 31, 2013, Seller and Buyer agreed to amend the Sale Agreement to extend the proposed date of Closing through January 31, 2014; and,

WHEREAS, by electronic mail dated January 27, 2014, Seller and Buyer agreed to amend the Sale Agreement to extend the proposed date of Closing through February 28, 2014; and

WHEREAS, by electronic mail dated February 11, 2014, Seller and Buyer agreed to amend the Sale Agreement to extend the proposed date of Closing through March 7, 2014; and

WHEREAS, because the Parties do not anticipate receiving the County No Further Action Letter prior to March 7, 2014, the Parties now desire to amend the Sale Agreement as set forth below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Status of Conditions Affecting Close of Escrow.** The Parties acknowledge and agree to the conditions set forth below, each of which affects the closing of the sale of the Property as contemplated by the Sale Agreement.

   1.1. **Demolition and Removal of Existing Structures; Excavation and Removal of Contaminated Soils.** Prior to the Effective Date, Seller demolished and removed all existing structures on the Property and thereafter excavated and removed the contaminated soil at the Property in accordance with the CAP.

   1.2. **Installation of Groundwater Monitoring Wells; Initial Groundwater Samples.** Prior to the Effective Date, Seller installed three (3) groundwater monitoring wells (the “Monitoring Wells”) on the Property, obtained groundwater samples from the Monitoring Wells and, in accordance with the CAP, Seller submitted the results thereof to the County in a Corrective Action Completion Report (the “Completion Report”) on February 6, 2014.

   1.3. **Groundwater Test Results.** On or about December 12, 2013, Seller obtained the laboratory results of the initial groundwater monitoring well samples
showing total dissolved solids ("TDS") below the San Francisco Bay Regional Water Quality Control Board's ("RWQCB's") threshold of 3,000 milligrams per liter (mg/L). Initial groundwater sample results also indicated concentrations of contaminants including total petroleum hydrocarbons as hydraulic oil (TPHho) and heavy metals exceeding the cleanup goals ("CGs") established in the CAP and the RWQCB's environmental screening levels ("ESLs") for drinking water. The CGs for groundwater were established based on previous groundwater results for TDS which indicated that groundwater beneath the Property would not be considered a drinking water resource, and were based on ESLs for aquatic habitat goals. Because groundwater beneath the Property is most likely not impacting the aquatic habitat of San Francisco Bay, and is now considered a potential drinking water resource, the Seller's environmental consultant is recommending that the groundwater CG's be changed to drinking water ESLs.

1.4. Issuance of Soil Remediation Certificate. Seller's consultant submitted the Completion Report for the Property on February 6, 2014. The County has up to sixty (60) days to respond to the Completion Report, thus Seller anticipates that the County will issue to the Seller a certificate or letter stating that the remediation of the soil at the Property has been completed in accordance with the CAP (the "Soil Remediation Certificate") by April 6, 2014.

1.5. Additional Groundwater Samples or Alternative Requirements. Seller anticipates that by December 31, 2014, Seller shall have either (a) obtained and submitted to the County, the results of three (3) additional groundwater monitoring events, and/or (b) obtained approval from the County to discontinue monitoring of the groundwater due to the levels of contaminants being below the applicable ESL’s or trending towards eventually being below the applicable ESL’s.

1.6. Issuance of County No Further Action Letter. Provided that either (a) Seller obtains County's approval to discontinue monitoring of the groundwater, or (b) subsequent groundwater samples, if any, confirm levels of contaminants being below the applicable ESL’s, Seller anticipates that the County will consider the site for case closure. The case closure process will involve a 30 to 60 day public notification and comment period informing the neighboring community of the proposed case closure. Following completion of the public notification and comment period, Seller anticipates that the County will request the destruction of Monitoring Wells on the Property, and that following the destruction of Monitoring Wells on the Property, the Seller will submit a Monitoring Well Destruction Report to the County. The Seller anticipates that within approximately sixty (60) days thereafter, or by June 30, 2015, the County will issue the County No Further Action Letter to Seller.

2. Close of Escrow. Buyer hereby waives the closing condition requiring Seller to have obtained the County No Further Action Letter and the Parties agree that Close of Escrow shall now occur on a mutually acceptable date (the "Revised Closing Date") that is not later than fifteen (15) days after the date on which the County has issued the Soil Remediation Certificate; provided however, in no event shall the Revised Closing Date be later than May 15, 2014, without the mutual written consent of the Parties hereto.
2.1 **Duty to Cooperate; Failure to Obtain County No Further Action Letter.** The Parties agree to cooperate with each other and with the County, and Seller agrees to provide the County with any information it reasonably requires to facilitate County's issuance of a Soil Remediation Certificate on or before March 31, 2014 and the County No Further Action Letter by June 30, 2015.

2.2 **Seller’s Duties Post-Closing of Escrow.** Notwithstanding the Close of Escrow, Seller shall remain obligated to comply with the CAP and agrees to diligently pursue obtaining the County No Further Action Letter. The Parties agree that to secure Seller’s obligation to diligently pursue obtaining the County No Further Action Letter, the sum of $50,000 (the “Holdback Amount”), shall be retained in escrow from the funds Buyer deposits into escrow to pay the purchase price for the Property. The Holdback Amount shall be released to Seller upon the occurrence of any of the following events:

2.2.1 **County Requirement for Land Use Restriction.** If after completion of any additional period of groundwater monitoring that may be required by the County, but in no event beyond December 31, 2015, the County will not issue a No Further Action Letter without Buyer's agreement to a Land Use Restriction limiting the beneficial use of the groundwater, then Buyer shall agree to such Land Use Restriction, provided that it results in the issuance of a No Further Action Letter by the County.

2.2.2 **Completion of Groundwater Monitoring; Removal of Contaminated Soils.** Completion by Seller of quarterly water quality monitoring that may be required by the County, but in no event beyond December 31, 2015, and the removal, at Seller’s expense, of any soil containing contaminates at concentrations exceeding the Clean Up Goals established in the CAP Addendum (the “CG’s”), solely to the extent excavated by Buyer in connection with Buyer’s construction of the Public Works Service Center and then only to the extent such costs exceed amounts budgeted by Buyer for the removal of non-contaminated soils or soils containing contaminates which do not exceed CG’s, in connection with such project.

2.2.3 **Failure to Obtain No Further Action Letter.** Provided that Seller has diligently pursued obtaining the No Further Action Letter from the County, as determined by Buyer acting reasonably, but the County has not issued a No Further Action Letter by December 31, 2015.

3. **Right of Entry.** Concurrent with the Close of Escrow, Buyer shall grant Seller a non-exclusive right of entry to the Property for the limited purpose of maintaining, repairing, taking samples from and ultimately sealing the Monitoring Wells and doing or engaging others to do any other acts reasonably required by the County in order to obtain the County No Further Action Letter.

4. **No Further Amendment.** Save and except as herein provided, all of the terms and conditions set forth in the Sale Agreement remain in full force and effect.

[Signatures Appear on Following Page]
IN WITNESS WHEREOF, the Parties have executed this First Amendment to Purchase and Sale Agreement as of the date first written above.

BUYER:
CITY OF ALBANY, a municipal corporation

By:__________________________
Name: Penelope Leach
Title: City Manager

ATTEST:
By:____________________________
City Clerk

APPROVED AS TO FORM:
By:____________________________
Craig Labadie, City Attorney

SELLER:
WESTERN FORGE & FLANGE CO., a
California corporation

By:____________________________
Name: Walt Pierce
Title: President
RESOLUTION NO. 2014-10

PASSED AND APPROVED BY THE COUNCIL OF THE CITY OF ALBANY,

The 3rd day of March, 2014, by the following votes:

AYES: Council Members Atkinson, Barnes, Maass, Vice Mayor Wile & Mayor Thomsen

NOES: none

ABSENT: none

ABSTAINED: none

RECUSED: none


Eileen Harrington

DEPUTY CITY CLERK